

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

QUINTON HARRIS; JOHN BAKER;
GEOFFREY MILLER; NORMAN MOUNT;
THOMAS TAYLOR; AND SCOTT ZINN;
individually and on behalf of other similarly
situated,

CASE NO. 8:16cv381-JFB-SMB

Plaintiffs,
v.
UNION PACIFIC RAILROAD COMPANY,
Defendant.

**DECLARATION OF ROBERT L.
SCHUG IN SUPPORT OF MOTION
FOR CLASS CERTIFICATION**

I, Robert L. Schug, declare as follows:

1. I am over the age of twenty-one, competent, and have personal knowledge of all facts stated herein. I make this Declaration in support of Plaintiffs' Motion for Class Certification Pursuant to Fed. R. Civ. P. 23.

2. I am a Partner with Nichols Kaster, PPLP, and am counsel of record for Plaintiffs and proposed class representatives Quinton Harris, John Baker, Geoffrey Miller, Norman Mount, Thomas Taylor, and Scott Zinn.

3. In the time since the proposed class representatives joined the case, they have each demonstrated a commitment to the members of the putative class. They have done this by, for instance, assisting with the investigation and preparation of the case, responding to interrogatories and document requests, searching for and producing documents, sitting for depositions, and consulting periodically regarding case-related issues. Each of these individuals have remained available and in regular contact with our office.

4. Along with co-counsel, our office represents approximately 193 other members of the putative class who have been removed from service due to the Union Pacific fitness-for-duty and reportable health events policies challenged in this litigation. Many of these individuals will participate in the phase one liability trial in this case if needed, and all of them would make claims for monetary relief in the event that phase two *Teamsters* proceedings are conducted.

5. Nichols Kaster has significant experience in litigating complex class actions, representing thousands of individuals around the country in class action litigation, including case involving discrimination, wage and hour violations, ERISA violations, consumer issues, and other issues. The firm is willing to commit the resources necessary to litigate this case through trial and any appeals. The experience of the firm is summarized in our Firm Resume, which is attached as **EXHIBIT 1**.

6. Nichols Kaster has been appointed class counsel or served as counsel for numerous class and collective actions. Recent cases within the past five years include the following: *Conlon v. Surly Brewing Co.*, No. 27-CV-16-2517 (Minn. Dist. Ct. May 4, 2017); *Seipel v. Safety Signs, Inc.*, No. 15-cv-71 (D. Minn. Aug. 27, 2015); *Randolph v. Centene Management Co.*, 2015 WL2062609, at *1 (W.D. Wash. May 4, 2015); *Ellsworth v. U.S. Bank, N.A.*, 2014 WL 2734953 at *18 (N.D. Cal. June 13, 2014); *McKeen-Chaplin v. Provident Savings Bank, FSB*, No. 2:12-cv-03035-GEB-JFM (E.D. Cal. Aug. 12, 2013); *Williams v. U.S. Bank, N.A.*, No. 2:12-cv-01907-LKK, 2013 WL 3119055 (E.D. Cal. June 20, 2013); *Long v. CPI Security Sys., Inc.*, No. 3:12-cv-00396, 2013 WL 2154801 (W.D.N.C. May 17, 2013); *Michaud v. Monro Muffler Brake, Inc.*, No. 2:12-cv-00353-NT (D. Maine May 8, 2013); *Alvarez v. Diversified Main. Sys., Inc.*, No. 11-3106 (D. Minn. Feb. 14, 2013); *Struck v. PNC Bank, N.A.*, No. 2:11-cv-00982, 2013 WL 571849 (S.D. Ohio Feb. 13, 2013); *Latham v. Branch Banking &*

Trust Company, No. 1:12-cv-00007 (M.D.N.C. Nov. 13, 2012); *Ruffin v. Entertainment of the Eastern Panhandle, Inc.*, No. 3:11-cv-00019, 2012 WL 5472165 (N.D. W.Va. Nov. 9, 2012); *Spar v. Cedar Towing & Auction, Inc.*, Case No. 27-CV-11-24993 (Minn. Dist. Ct. Oct. 16, 2012); *Heibel v. U.S. Bank, N.A.*, No. 11- 00593, 2012 WL 4463771 (S.D. Ohio Sept. 27, 2012); *Ginter v. RBS Citizens, N.A.*, No. 12- 00008-M-DLM (D.R.I. Sept. 17, 2012); *Kiessel v. The Corvus Group*, No. 12-390 PAG (N.D. Ohio July 6, 2012); *Myles v. Prosperity Mortgage Co.*, No. Civ. CCB-11-1234, 2012 WL 1963390 (D. Md., May 31, 2012); *Calderon v. Geico Gen. Ins. Co.*, RWT 10CV1958, 2011 WL 98197 (D. Md. Jan. 12, 2011) (granting conditional certification) and 279 F.R.D. 337 (D. Md. 2012) (granting Rule 23 class certification); *Swigart v. Fifth Third Bank*, 276 F.R.D. 210 (S.D. Ohio) (granting conditional certification) and 288 F.R.D. 177 (S.D. Ohio 2012) (granting Rule 23 class certification).

7. Within our office, this matter has been primarily handled by me, James H. Kaster, David E. Schlesinger, Charles A. Delbridge, Neil D. Pederson, and Laura A. Baures. The experience of these attorneys is summarized below, and is also contained in the attached Firm Resume, referenced above.

8. I am a Partner at Nichols Kaster. I graduated from the Middle Tennessee State University *summa cum laude* in 2003 and received a J.D. from William Mitchell College of Law *summa cum laude* in 2006. I have spent most of my career with Nichols Kaster, PLLP, representing employees in class and collective litigation in wage and hour and discrimination cases.

9. James H. Kaster is at Partner at Nichols Kaster, PLLP. He graduated from Marquette University in 1976 and received a J.D. from Marquette University in 1979. He has spent his career at Nichols Kaster representing employees primarily in individual employment

litigation cases.

10. David E. Schlesinger is a Partner at Nichols Kaster, PLLP. He graduated from Mary Washington College *cum laude* in 2001 and received his J.D. from University of Minnesota Law School *cum laude* in 2006. He has spent his career at Nichols Kaster representing employees in individual employment litigation cases.

11. Charles A. Delbridge is an Associate Attorney at Nichols Kaster, PLLP. He graduated from the University of Wisconsin – Madison in 2003 and received his J.S. from William Mitchell College of Law *magna cum laude* in 2006.

12. Neil D. Pederson is an Associate Attorney at Nichols Kaster, PLLP. He graduated from the University of Minnesota *summa cum laude* in 2007 and received his J.D. from William Mitchell College of Law *summa cum laude* in 2015.

13. Laura A. Baures is a Staff Attorney at Nichols Kaster, PLLP. She graduated from the University of Wisconsin – Eau Clare *cum laude* and received a J.D. from William Mitchell College of Law.

14. Attached are true and correct copies of the following exhibits:

EXHIBIT 1: Nichols Kaster, PLLP Firm Resume

EXHIBIT 2: Form 10-K for Union Pacific Corporation (Excerpts)

EXHIBIT 3: 2017.03.08 - Email “Fw: Another PDQ” with attachment (filed under seal)

EXHIBIT 4: 2017.03.08 - Email chain “Fw: Another PDQ” (filed under seal)

EXHIBIT 5: 2017.05.06 - Proposed JOEM Supplement: Fitness-for-Duty Guidelines for Transportation (filed under seal)

EXHIBIT 6: 2015.06.23 - Changes in work restrictions for UPRR workers with seizures

EXHIBIT 7: 2011.12.27 Email chain “Re: getting DOT Medical Examiners

book – for all 4 physicians” (filed under seal)

EXHIBIT 8: Expert Report of Dr. Kevin Trangle dated March 16, 2018 (filed under seal)

EXHIBIT 9: UP: Health and Medical Contacts List

EXHIBIT 10: 2014 Performance Management Form for John P. Holland (filed under seal)

EXHIBIT 11: 2014.10.16 Draft FFD Communication Guidelines (filed under seal)

EXHIBIT 12: Fitness for Duty Process Flowchart (filed under seal)

EXHIBIT 13: Fitness for Duty Process Flowchart (filed under seal)

EXHIBIT 14: Fitness for Duty Process Flowchart (filed under seal)

EXHIBIT 15: Fitness for Duty Process Flowchart (filed under seal)

EXHIBIT 16: Fitness for Duty Process Flowchart (filed under seal)

EXHIBIT 17: HR Health and Medical, All Standard HMS_All_General Contact & General Information Consultations, Version 1

EXHIBIT 18: HR, Health and Medical, Clinical Services Standard Work OHN MLOA Less than 30 Days, Version 1

EXHIBIT 19: eHealthSafe Medical Documents Quick Reference Guide

EXHIBIT 20: HR, Health and Medical, Clinical Services Standard Work OHN RTW FURLOUGH < THAN 1 YEAR, Version 1

EXHIBIT 21: HR, Health and Medical, Clinical Services Standard Work OHN_Furlough < 1 year_Interim Health History Form & Process, Version 1

EXHIBIT 22: HR, Health and Medical, Clinical Services Standard Work OHN_TPW ADMINISTRATION, Version 1

EXHIBIT 23: Health & Medical Services Standard Work Sheet (Monitoring) (filed under seal)

EXHIBIT 24: UP: Medical Rules

EXHIBIT 25: [INTENTIONALLY LEFT BLANK]

EXHIBIT 26: [INTENTIONALLY LEFT BLANK]

EXHIBIT 27: Defendant's First Supplemental Answers to Plaintiffs' Interrogatories to Defendant, Set II

EXHIBIT 28: 2013.10.18 HMS Process Guideline: when FFD review is needed prior to TPW/RA (filed under seal)

EXHIBIT 29: Restricted Prescription Drugs (filed under seal)

EXHIBIT 30: Template Leave of Absence Letter

EXHIBIT 31: Template Leave of Absence Letter

EXHIBIT 32: Template Leave of Absence Letter

EXHIBIT 33: Template Leave of Absence Letter

EXHIBIT 34: Template Medical Request to Employee Letter

EXHIBIT 35: Template Medical Request to Employee Letter

EXHIBIT 36: Template Medical Progress Report

EXHIBIT 37: Template Authorization to Release Protected Health Information for Employees

EXHIBIT 38: Template Request to Treating Physician Letter

EXHIBIT 39: Template Request to Treating Physician Letter

EXHIBIT 40: Template Medical Records Request to Treatment Facility Letter

EXHIBIT 41: Template Follow Up Request to Employee Letter

EXHIBIT 42: Template Follow UP Request to Employee Letter

EXHIBIT 43: Template Clarification of Medical Information Letter

EXHIBIT 44: Rebuttal Expert Report of Dr. John Holland dated May 11, 2018 (filed under seal)

EXHIBIT 45: 2016.07.26 HMS Clinical Procedure – Fitness-for-Duty Memos / Standard Work Restrictions (filed under seal)

EXHIBIT 46: 2016.11.25 Standard Work Restrictions – for Sudden Incapacitation Risk

EXHIBIT 47: Undated Work restrictions for Electric and Magnetic (EMF) Exposures

EXHIBIT 48: 2015.10.29 Standard Work Restrictions – for Hearing Impairments – Train Crew (filed under seal)

EXHIBIT 49: 2016.06.06 HSM [sic] Clinical Process – Standard Work Restrictions for failed CVFT (filed under seal)

EXHIBIT 50: 2016.10.21 Email to Associate Medical Directors, “Please keep these for your reference” (filed under seal)

EXHIBIT 51: C3-4 – Return to work after: Significant Hearing Loss, Inner Ear Surgery, New Hearing Aids (filed under seal)

EXHIBIT 52: B1-4 – Return to work after: Seizure or Loss of Consciousness (filed under seal)

EXHIBIT 53: E1 – Return to work after: Severe obstructive sleep apnea (filed under seal)

EXHIBIT 54: A1-3 – Return to work after: Heart Attach, Cardiac Arrest, Serious Cardiac Arrhythmias (filed under seal)

EXHIBIT 55: D1-2 – Return to Work after: Diabetes treated with Insulin (filed under seal)

EXHIBIT 56: C1-2 – Return to work after: Significant Vision Change or Eye Surgery (filed under seal)

EXHIBIT 57: A6 – Return to work after: Heart Surgery or Invasive Cardiovascular Procedures (filed under seal)

EXHIBIT 58: A4-5 – Return to work after: Stroke, TIA, or Bleeding inside the Skull or Brain (filed under seal)

EXHIBIT 59: Appendix B: Duration of Work Restrictions by Condition (filed under seal)

EXHIBIT 60: Expert Report of Dr. John Holland dated March 6, 2018 (filed under seal)

EXHIBIT 61: Expert Report of Dr. Michael Greenberg dated March 5, 2018 (filed under seal)

EXHIBIT 62: Expert Report of Dr. Matthew Rizzo dated March 6, 2018 (filed under seal)

EXHIBIT 63: Expert Report of Russell Quimby dated May 1, 2018 (filed under seal)

EXHIBIT 64: Expert Report of Dr. Kevin Trangle dated March 16, 2018 (filed under seal)

EXHIBIT 65: Rebuttal Expert Report of Dr. Kevin Trangle dated May 3, 2018 (filed under seal)

EXHIBIT 66: Expert Report of Jon (Paul) Dillard dated February 18, 2018 (filed under seal)

EXHIBIT 67: Rebuttal Expert Report of Dr. Jay Neitz dated May 1, 2018 (filed under seal)

EXHIBIT 68: Defendant's Fourth Set of Supplemental Responses to Plaintiffs' Requests for Production to Defendant, Set I

EXHIBIT 69: 2014.04.14 Health and Medical Services Creating Customer Value Claims Update (filed under seal)

EXHIBIT 70: Fitness for Duty Process Standard Work Pre-work (filed under seal)

EXHIBIT 71: 2014.05.26 FFD Enhancements Guidelines, Medical Records, Analytics & Other (filed under seal)

EXHIBIT 72: 2014.10 FFD Enhancements Union Pacific Medical Rules (filed under seal)

EXHIBIT 73: 2012.10.31 Electromagnetic Field Evaluations/ FFD Determinations Discussion (filed under seal)

EXHIBIT 74: 2016.06.02 Email "List of active employees with seizures who need new WR" (filed under seal)

EXHIBIT 75: 2016.06.02 A-EEs needing new WR for seizures (filed under seal)

EXHIBIT 76: 2016.10.27 Update: Medical Guidelines, ADA / EEOC Considerations in Fitness-for-Duty Determinations for Workers

Safety Critical Positions (filed under seal)

EXHIBIT 77: 2016.10.27 Medical Fitness-For-Duty Guidelines (filed under seal)

EXHIBIT 78: 2016.10.28 Email chain “Re: Updated slides – on Fitness-for-Duty and Guidelines” (filed under seal)

EXHIBIT 79: 2012.08.09 Email “contracts – Guideline consultants – updated 8-8-12” (filed under seal)

EXHIBIT 80: 2012.08.08 Attachment 2 – Project Budget Development of UPRR Medical Fitness-for-Duty Guidelines (filed under seal)

EXHIBIT 81: 2012.08.08 UPRR Medical Fitness-for-Duty Guidelines Project – Consultant Contact / Business Information (filed under seal)

EXHIBIT 82: 2012.08.08 Work Order for FFD Guidelines – for Seizure Guideline (filed under seal)

EXHIBIT 83: 2012.08.08 Work Order for FFD Guidelines – Initial Development Phase (filed under seal)

EXHIBIT 84: 2012.08.08 UPRR Medical Fitness-for-Duty Guidelines Project – Consultant Contact / Business Information (filed under seal)

EXHIBIT 85: 2012.08.08 Work Order for FFD Guidelines – Initial Development Phase (filed under seal)

EXHIBIT 86: 2012.08.08 Work Order for FFD Guidelines – for Seizure Guideline (filed under seal)

EXHIBIT 87: 2016.07.18 Email chain “Re: Medical Fitness for Duty Guideline on Seizures – for your Peer Review” (filed under seal)

EXHIBIT 88: 2013.09.29 Email “template CMO memo” (filed under seal)

EXHIBIT 89: 2016.08.23 Email “Guideline chapters to be sent to Health Services Advisory Council” (filed under seal)

EXHIBIT 90: 2015.03.03 Explanation of medical work restrictions for Mr. Geoffrey Miller

EXHIBIT 91: 2018.05.16 Your medical Fitness-for-Duty determination and current work restrictions

EXHIBIT 92: Medical Comments History (Scott K. Zinn)

EXHIBIT 93: Rebuttal Expert Report of Dr. Robert Goldstein dated May 2, 2018 (filed under seal)

EXHIBIT 94: Rebuttal Expert Report of Dr. Michael Devereaux dated April 20, 2018 (filed under seal)

EXHIBIT 95: Declarations of putative class members William Alarcon, Leonard Barkmeier, Ramiro Barrera, Tom Bartels, Mark Brasier, Mathew Bray, Mike Bray, Brian Kane, Anthony Brollini, Darryl Bullock, Robert Carlton, Raul Cervera, Michael Ryan Cushman, Ronald Daniel, Todd DeGeer, Nathan Derr, Justin Donahue, Robert Fegler, Ralph Freed, Murray Garrett, Carlos Hagar, Doug Harpster, James Darren Hawkins, Jim Hoffman, Casey Hunt, William Hurd, Stefan Hyatt, Lance Jenkins, Cleve Kerrick, Kent Kirk, Edward Koci, Hans Leoher, Anthony Malone, Richard Mayer, Brent McDonald, Stan Mendrun, David Meza, Michael Moore, Barry Parker, Tim Powell, Allen Pruitt, Raymundo Rivera, Robert Corrington, Brian Soreng

15. Attached as **EXHIBIT 96** is the Declaration of Alexander Wise, who is employed by Nichols Kaster, PLLP, and who has compiled a summary of voluminous evidence produced by Union Pacific pursuant to Fed. R. Evid. 1006. The summarized evidence is information about Union Pacific employees that Union Pacific provided to Plaintiffs in the form of three Microsoft Xcel spreadsheets. Union Pacific labelled these spreadsheets: UP_Harris_202506 (“eHealthsafe Data”), UP_Harris_238006 (“Supplemental eHealthsafe Data”), and UP_Harris_408498 (“Service Restriction Data”).

16. The **eHealthsafe Data** (UP_Harris_202506) and **Supplemental eHealthsafe Data** (UP_Harris_238006) consist of employees identified by Union Pacific who were subject to a fitness-for-duty exam related to a reportable health event. (Haynes 30(b)(6) Dep. (2018) 31:3-8 (employees on the “class list”).) They are a compilation of health data entered and stored by Union Pacific for these individuals. (Haynes 30(b)(6) Dep. (2018) 24:16-25:13; 43:18-44:3.)

17. The **Service Restriction Data** (UP_Harris_408498) consists of employees

identified by Union Pacific who were subject to a fitness-for-duty exam related to a reportable health event and who also had data about work restrictions. (Haynes 30(b)(6) Dep. (2018) 57:16-23) (based on employees on the “class list”.)

18. Below are the definitions of certain terms contained within the referenced spreadsheets, as explained by Union Pacific’s Rule 30(b)(6) witness, grouped according the paragraph of Mr. Wise’s declaration in which they appear:

a. (¶ 5) “SERVICE CLOSED DATE” means an employee was involved with Union Pacific’s Health and Medical Services, and that particular health service has been closed and resolved. (Aguilera 30(b)(6) Dep. 41:9-17.)

b. (¶ 6(a)) “SERVICE OUTCOME” is a “general description of what was the end result of the service” for a given employee. (Aguilera 30(b)(6) Dep. 57:20-24.) “CLEARED TO WORK – WITH PERMANENT RE” means an employee was cleared to work with permanent restrictions by Health and Medical Services. (Aguilera 30(b)(6) Dep. 62:3-13.) “CLEARED TO WORK – WITH TEMPORARY RE” means an employee was cleared to work with temporary restrictions. (Aguilera 30(b)(6) Dep. 62:23-63:6.) “NOT CLEARED TO WORK” means that, at the time of entry, the employee was not cleared to work. (Aguilera 30(b)(6) Dep. 67:22-68:3.)

c. (¶ 6(b)) “SERVICE CLOSURE REASON” also explains why Union Pacific closed a service for a given employee. (Aguilera 30(b)(6) Dep. 41:23-42:2.) “EE NOT ABLE TO RETURN TO WORK” means an employee “wasn’t able to return to work.” (Aguilera 30(b)(6) Dep. 45:4-8.) “MANAGER DOES NOT AGREE TO ACCOMMODATE – REFER TO ACCOM COMM” means an “employee was issued restrictions that the manager could not accommodate.” (Aguilera 30(b)(6) Dep. 48:6-10.) “MEDICAL DISQUALIFIED” means, in

general, an “employee has been disqualified from any work at Union Pacific.” (Aguilera 30(b)(6) Dep. 49:11-19.)

d. (¶ 7) “DIAGNOSIS KEY CATEGORY” describes when Union Pacific enters an employee’s medical diagnosis into Union Pacific’s health data. (Aguilera 30(b)(6) Dep. 85:16-22.) Entering a medical diagnosis is optional and does not always occur. (Aguilera 30(b)(6) Dep. 81:2-82:11.)

e. (¶¶ 10, 11) WA-CAT” describes the types of restrictions imposed on an employee. (Aguilera 30(b)(6) Dep. 93:15-18.). “LIMI_STRDATE” means the start date that Union Pacific imposed work restrictions on an employee, and “LIMI_ENDATE” is “the date their restriction was lifted or ended.” (Aguilera 30(b)(6) Dep. 89:5-10.)

EXHIBIT 97: Proposed Class Notice

19. Attached are true and correct copies of the following deposition transcript excerpts:

EXHIBIT A: Dr. John Holland, March 28, 2017

EXHIBIT B: Dr. John Holland, April 28, 2016

EXHIBIT C: Dr. John Holland, August 9, 2018

EXHIBIT D: Dr. John Charbonneau, dated April 4, 2018

EXHIBIT E: Dr. Matthew Hughes, April 25, 2018

EXHIBIT F: Dr. Donald Lewis, May 8, 2018

EXHIBIT G: Rhonda Ross dated, March 8, 2018

EXHIBIT H: Dr. John Holland, July 12, 2018

EXHIBIT I: Dr. Michael Greenberg, June 26, 2018

EXHIBIT J: Edward Willis, May 2, 2018

EXHIBIT K: Debra Ann Gengler, March 7, 2018

EXHIBIT L: John Baker, November 8, 2017

EXHIBIT M: Norman Keith Mount, November 9, 2017

EXHIBIT N: Heather Aguilera, June 5, 2018

EXHIBIT O: Kyle Haynes, June 5, 2018

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: August 17, 2018

s/Robert L. Schug
Robert L. Schug